Supreme Court, U.S.
FILED
JAN 28 2002
OFFICE OF THE CLERK

(2)

No. 01-924

IN THE

Supreme Court of the United States

ODELL JOHNSON, JR.,

Petitioner,

v.

CITY OF SAN ANTONIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JACQUELINE M. STROH
Counsel of Record
CROFTS & CALLAWAY
A PROFESSIONAL CORPORATION
112 East Pecan Street
Suite 800
San Antonio, TX 78205-1517
(210) 299-0289

DEBORAH LYNNE KLEIN
OFFICE OF THE CITY ATTORNEY
Assistant City Attorney IV
P.O. Box 839966
San Antonio, TX 78283-3966
(210) 207-8950

MARK KOSANOVICH
FITZPATRICK & KOSANOVICH, P.C.
P.O. Box 831121
San Antonio, TX 78283
(210) 207-7259

Attorneys for Respondent

171958

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

28P

QUESTIONS PRESENTED

Whether Petitioner has waived the issue of whether a hostile work environment claim can be based on engaging in protected activity under 42 U.S.C. § 2000e-3 by failing to assert the claim in his First Amended Complaint in the trial court.

Whether Petitioner has failed to assert any basis for the exercise of this Court's certiorari jurisdiction.

Whether the Fifth Circuit's decision below must be affirmed because Petitioner failed to challenge the Fifth Circuit's holding that Johnson's opposition to Lt. Griffin's orders was not protected activity under Title VII, a predicate element of any retaliation claim, including one alleging the creation of a hostile work environment.

Whether the Fifth Circuit's decision below must be affirmed because Petitioner failed to challenge the Fifth Circuit's holding that Johnson did not suffer an adverse employment action for purposes of his retaliation claim and failed to challenge the Fifth Circuit's construction of that element as applied to retaliation claims generally.

Whether the Fifth Circuit's decision below must be affirmed on the independent alternative ground that Johnson has failed to demonstrate that any alleged harassment crossed the requisite abusiveness threshold such that it affected a term, condition, or privilege of employment.

Whether the Fifth Circuit's decision below must be affirmed on the independent alternative ground that Johnson has failed to demonstrate any causal connection between the alleged harassment and any protected activity under section 2000e-3.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Statement of Facts	1
B. Proceedings Below	6
Reasons for Denying the Writ	9
1. Johnson Has Waived Any Argument Regarding the Viability of a Hostile Work Environment Claim Based on Engaging in Protected Activity Under 42 U.S.C. § 2000e-3 by Failing to Plead It in His Trial Court Complaint	10
2. Petitioner Has Waived Review in This Court By Failing to Assert Any Basis for This Court's Review	14
3. Petitioner Has Waived the Only Issue He Presents to This Court By Failing to Challenge the Fifth Circuit's Holding That He Did Not Engage in Protected Activity Under 42 U.S.C. § 2000e-3	15

Contents

Page

4. Petitioner Has Waived the Only Issue He Presents to This Court By Failing to Challenge the Fifth Circuit's Treatment of the Adverse Personnel Action Element of Claims Brought Under 42 U.S.C. § 2000e-3 18

5. Respondent Raised Other Grounds Below That Provide Independent Support for the Fifth Circuit's Decision and Judgment 19

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Bishena v. Marriott Corp., 959 F.2d 239, 1992 WL 73193 (9th Cir. 1992) 14

Blair v. Oesterlein Mach. Co., 275 U.S. 220 (1927) 14

Boykin v. Michigan Dep't of Corr., 211 F.3d 1268, 2000 WL 491512 (6th Cir. 2000) 14

Braxton v. United States, 500 U.S. 344 (1991) 14

Ceasar v. North Star Steel Texas, Inc., 69 F. Supp. 2d 858 (E.D. Tex. 1999) 8

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 17

Conley v. Gibson, 355 U.S. 41 (1957) 12

Daniels v. Williams, 474 U.S. 327 (1986) 17

Duignan v. United States, 274 U.S. 195 (1927) ... 13

Evans v. City of Houston, 246 F.3d 344 (5th Cir. 2001) 16, 19

Fort Stewart Sch. v. Federal Labor Relations Auth., 495 U.S. 641 (1990) 16

Cited Authorities

	Page
General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982)	16
Goodman v. State of Maryland Dep't of Social Servs., 64 F.3d 657, 1995 WL 501355 (4th Cir. 1995)	14
Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)	14
Hang On, Inc. v. City of Arlington, 65 F.3d 1248 (5th Cir. 1995)	13
Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993)	15, 19
Heckler v. Campbell, 461 U.S. 458 (1983)	14
Hormel v. Helvering, 312 U.S. 552 (1941)	13
Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp., 510 U.S. 27 (1993)	17
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)	15
Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir.), *cert. denied*, 522 U.S. 932 (1997)	18
Mato v. Baldauf, 267 F.3d 444 (5th Cir. 2001)	19

Cited Authorities

Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 14

Serna v. City of San Antonio, 244 F.3d 479 (5th Cir.), *cert. denied*, 122 S. Ct. 347 (2001) 18

Steagald v. United States, 451 U.S. 204 (1981) ... 17

Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307 (5th Cir. 2000) 13

United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) 13, 14

Walker v. Thompson, 214 F.3d 615 (5th Cir. 2000) ... 19

Williams v. Army & Air Force Exch. Serv., 830 F.2d 27 (3d Cir. 1987) 13

Statutes:

42 U.S.C. § 2000e-2(a) 14, 18, 19

42 U.S.C. § 2000e-3 ..... *passim*

Rules:

FED. R. CIV. P. 10(b) 12

United States Supreme Court Rule 14.1(a) 17

Respondent City of San Antonio respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's unreported opinion in this case.

STATEMENT OF THE CASE

A. Statement of Facts

Odell Johnson became a San Antonio Police Officer in 1985 upon graduating from the San Antonio Police Academy. (X "A" to Doc. No. 17 at 7) In 1992, Johnson requested and was granted a transfer to the Downtown Foot and Bicycle Patrol Unit ("DFBU") and worked as part of the evening shift. (X "A" to Doc. No. 17 at 11-12) In 1993, Lt. Harry Griffin was assigned to the DFBU to manage its day-to-day operations; he had previously been assigned to this unit only as to the day shift, which was from 10:00 a.m. to 6:00 p.m. (X "A" to Doc. No. 17 at 12, 14; "B" at 1) As the unit Lieutenant, Griffin primarily worked the day shift, but would, on occasion, remain for a portion of the evening shift, which was from 6:00 p.m. to 2:00 a.m. (X "A" to Doc. No. 17 at 15; X "B" to Doc. No. 17 at 1)

According to Johnson, Griffin began, some time in late 1993, to discriminate against Johnson on the basis of race. (X "A" to Doc. No. 17 at 14-16) Johnson alleges that this discrimination was displayed through Griffin's specific request for Johnson to handle arrests, which Johnson characterized as being "singled out." (X "A" to Doc. No. 17 at 19-21) Johnson alleged that in 1993 he questioned Griffin regarding this treatment, and Griffin responded that he did not feel Johnson was visible enough. (X "A" to Doc. No. 17 at 21-22) Johnson also complained that Griffin "talked down" to him and that Griffin began to "nitpick" his uniform, though

Johnson conceded that on those days his uniform did not match. (X "A" to Doc. No. 17 at 23, 30) Johnson began in late 1993 or early 1994 to keep track of instances where he felt he was "singled out" by recording them in his field notes. (X "A" to Doc. No. 17 at 26-27)

During this same time, Griffin was experiencing resistance to his orders from some DFBU members, predominantly members of the evening shift. (X "B" to Doc No. 17 at 2) The purpose and philosophy behind the DFBU was to create a police presence in the downtown area to help eliminate crime and to create a safe environment for citizens and visitors to the downtown area. (X "B" to Doc. No. 17 at 1; X "C" to Doc. No. 17 at 1) A major policing concern in the downtown area at the time was the difficulty with gangs, which created problems in the form of violence among gang members, assaults on others, theft, robbery, public intoxication, and disorderly conduct. (*Id.*) The DFBU operated differently from other units in the SAPD because its members were not regularly subject to calls through dispatch; instead, they were to address problems in a preemptive fashion, as they became apparent. (*Id.*)

From Griffin's experience serving as a sergeant of the day shift, he determined that the monthly records that reflected activity of the evening shift were low in light of the increased activity that occurred in the evening. (X "B" to Doc. No. 17 at 2) Griffin questioned the productivity of several officers of the DFBU's evening shift. (*Id.*) Griffin also instructed the officers to engage in proactive policing in the downtown area in an effort to prevent crime rather than responding to it after the fact. (*Id.*) As part of this proactive policing, Griffin encouraged the officers to maintain a "zero tolerance" position toward persons who were

"regulars" in the downtown area and, thus, familiar with the law. (*Id.* at 1) In contrast, he requested that officers show leniency to tourists who were first time offenders. (*Id.* at 1-2) Several of the evening shift officers were unhappy with this proactive approach and challenged Griffin's orders and his authority. (*Id.* at 2) Though this group of officers, which included Officer Johnson, alleged that the orders were a form of discrimination, they admitted that the orders did not direct them to treat persons of different races differently. (X "A" to Doc. No. 17 at 29)

Griffin felt that several of the evening shift officers, including Johnson, were not working to their full potential. (X "A" to Doc. No. 17 at 2) Accordingly, he counseled several of the officers to increase their productivity and visibility. (*Id.*) On evenings when Griffin did stay on duty, he called on other officers to assist, often calling on officers that he felt were not performing to the best of their ability. (*Id.*) Johnson was one such officer. (*Id.*)

Johnson, in response to Griffin's actions, contacted a city EEO representative, Officer Linda Taylor, in September 1994. (X "A" to Doc. No. 17 at 52) Johnson testified that he contacted Officer Taylor because:

> I just finally gotten — gotten tired of him constantly calling me and making remarks about me. He made remarks to the other officers that I was lazy and dead weight within the unit. And the being called out by name or called over the radio by him was very humiliating and I was – I had gotten tired of being humiliated in front of my peers.

(*Id.*) However, rather than pursuing a complaint, Johnson decided to attempt to increase his productivity. (*Id.* at 55)

Johnson did not follow through with this complaint, either with the City's EEO division or through the Federal EEO.

On July 19, 1995, Johnson and his partner, Gloria Vela, were assigned to patrol a section of downtown San Antonio, including the intersection of Commerce and Presa Streets from 6:00 p.m. to 8:00 p.m. (X "B" to Doc. No. 17 at 2) However, Johnson and Vela left their assigned patrol area early, without checking out. (*Id.*) Shortly thereafter, at approximately 7:45 p.m., Lt. Griffin was driving down Commerce Street in his vehicle and noticed several youths at a bus stop yelling and using profanity. (*Id.*) Griffin stopped his vehicle to confront the individuals and radioed for officers to contact him. (*Id.*) Neither Johnson nor Vela, the officers assigned to that area, responded by radio, although they heard the request. (*Id.*) Several of the youths ran away as Griffin approached, but he was able to detain three of them. (*Id.*) Griffin again requested that he be contacted by officers, and again Johnson and Vela failed to respond. (*Id.*) Finally, other officers responded to Griffin's calls and assisted him. (*Id.*) When Griffin learned that Johnson and Vela were assigned to patrol that area and that they appeared to have left their assignment early, Griffin ordered both of them to write a report explaining their actions. (*Id.*) Griffin then placed them and two other officers on "special assignment," giving them specific patrol areas, taking away their bicycles, and ordering them to check out with a sergeant prior to taking a break.[1] (*Id.* at 3) Subsequently, all four contacted EEO counselor Taylor and filed a complaint against Griffin. (X "A" to Doc. No. 17 at 64-65; "B" at 3)

---

1. The two other officers, Aguilar and Lockamy, were in a restaurant across the street from Griffin, watching him with the three individuals. (X "B" to Doc. No. 17 at 2) They failed to come to his assistance or respond to Griffin's radio request. (*Id.*)

In Johnson's complaint, he lamented of being "singled out." (R 97) He cited examples of punishment given to other officers that he felt was less severe than the special assignment that he and the other three officers received as a result of the July 19, 1995 incident. (X "E" to Doc. No. 17) After the complaint, Officer Taylor organized a meeting of the unit to air grievances. (X "A" to Doc. No. 17 at 72) The special assignments were lifted following the meeting and lasted for a total of only seven days. (X "B" to Doc. No. 17 at 3) Johnson contended below that Griffin continued to "single him out" and alleged that he was discriminated against when Griffin later called for him and joked that he had been selected at random. (X "A" to Doc. No. 17 at 75-77)

On November 21, 1995, Griffin observed a woman being assaulted and also observed Johnson and another officer in the area. (X "B" to Doc. No. 17 at 3) Griffin called for an officer to cover, at which time both Johnson and the other officer walked away from the location. (*Id.*) When Johnson was questioned regarding his failure to assist, he claimed that he was assisting a citizen whose car had stalled. (*Id.*) Further, he alleged that he did not have permission to leave his area to assist a fellow officer. (*Id.*) Based on this second failure to come to the assistance of a fellow officer and due to an increasing tension in the DFBU, Captain Rudy Vernon requested that Johnson be transferred from the unit. (X "B" to Doc. No. 17 at 3; X "C" to Doc. No. 17 at 2) Deputy Chief Richard Gleinser, after reviewing the reports, concurred and recommended the transfer to Chief Al Philippus. (X "F" to Doc. No. 17) As a result, Chief Philippus ordered that Johnson be transferred to a patrol unit. (X "G" to Doc. No. 17) Johnson was involuntarily transferred from the DFBU to the Northside Substation on January 9, 1996, which did not qualify as "the most dangerous beat" except according to Johnson. (X "A" to Doc. No. 17 at 89) Johnson retained his same pay,

rank, and benefits, including a shift differential, and retained the same basic duties. (X "F" to Doc. No. 17; X "H" to Doc. No. 17) In February 1996, Johnson filed a complaint with the Federal EEOC. (X "A" to Doc. No. 17 at 116)

In June 1996, after continuing problems in the DFBU, Chief Philippus empanelled a Special Operations Review Team, *i.e.*, the Blue Ribbon Committee, to investigate the DFBU. (X "G" to Doc. No. 17) The panel ultimately recommended the transfer of three officers, two sergeants, and Lt. Griffin. (X "B" to Doc. No. 17 at 3; "G" at 1; "J" at 1) Additionally, the committee recommended that the transfer of Johnson be upheld. (X "G" to Doc. No. 17 at 2; "J" at 2) Chief Philippus accepted the report and ordered the transfers. (*Id.*) In November 1996, Johnson was promoted to Detective Investigator.[2] (X "A" to Doc. No. 17 at 92)

B. Proceedings Below

Officer Odell Johnson filed suit in the United States District Court for the Western District of Texas, San Antonio Division, against the City of San Antonio pursuant to Title VII. (R 1-12) Johnson alleged discrimination based on national origin and also asserted various state law claims. (R 1) On November 17, 1999, Johnson's First Amended Complaint was filed. (R 91-103) The statement of facts contained in his complaint focused on alleged illegal orders given by Lt. Griffin to the Downtown Foot and Bike Patrol Unit ("DFBU") as a whole and his reaction to those orders. (R 92-99) His legal claims, however, consisted only of allegations that he was subjected to harassment by his

2. Had Johnson still been with the DFBU at the time of his promotion, he would have been involuntarily transferred from the unit because there are no Detective Investigator positions in that unit. (X "B" to Doc. No. 17 at 2)

supervisors because of his race and that he was retaliated against by being transferred because he filed an internal complaint of racial discrimination. (R 97-99) The City filed its motion for summary judgment on January 11, 2000, and Johnson filed his response on February 14, 2000. (R 104-29, 146-79) The City filed its summary judgment reply on February 28, 2000, as well as its objections to certain of Johnson's summary judgment evidence. (R 186-226) The trial court granted the City's motion for summary judgment by order signed August 17, 2000. (R 270-77)

Judge Hippolito Garcia recognized that this case involved no direct evidence of discrimination and, thus, focused on whether Johnson could state a claim under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973). (R 271) The district court first addressed Johnson's claim that he suffered disparate treatment based on his race, finding that Johnson failed to demonstrate an adverse employment action and failed to show that other officers were treated more favorably than he was. (R 275) Regarding Johnson's claims that he endured a racially hostile work environment, the district court held that Johnson failed to create a fact issue regarding the existence of racially discriminatory intimidation, ridicule, and insults that were sufficiently severe or pervasive that they altered the conditions of employment and created an abusive working environment. (R 274) Finally, the district court examined Johnson's claims of retaliation and found the absence of an adverse employment action, as well as the absence of a causal connection between any complaint made by Johnson and his lateral transfer from the DFBU to the Northside substation. (R 274) The district court concluded that Johnson failed to establish a *prima facie* case under any of his discrimination theories and that he had also failed to demonstrate that the

City's reasons for any action taken or not taken was pretextual. (R 276) Johnson filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit on September 1, 2000 and filed an amended notice of appeal on September 19, 2000. (R 279-80; SR 1-2)

Before the Fifth Circuit, Johnson added claims of discrimination that he did not plead in the trial court. Although not asserted in his First Amended Complaint,[3] Johnson claimed on appeal that he engaged in protected opposition because he opposed Lt. Griffin's discriminatory attitude toward and treatment of minority citizens in the San Antonio downtown area. (R 97-99) Furthermore, Johnson attempted to expand his allegation of a racially hostile work environment on appeal to include a claim that he endured a hostile work environment due to activity protected under section 2000e-3. (R 97-99)

A three-judge panel of the Fifth Circuit affirmed the trial court's judgment. The panel held that Johnson did not suffer an adverse employment action and, thus, could not state a Title VII retaliation claim pursuant to 42 U.S.C. § 2000e-3. *Johnson v. City of San Antonio*, 273 F.3d 1094 (5th Cir. 2001) (table). The Fifth Circuit also held that, even if Johnson could have established that he suffered an adverse employment action, his Title VII retaliation claims based on his opposition to Lt. Griffin's orders regarding the citizens of San Antonio would fail because Johnson was not opposing "unlawful *employment* practices" and rejected his hostile work environment claim based on Johnson's opposition to Griffin's orders on similar grounds. *Id.* (emphasis in original).

3. *See Ceasar v. North Star Steel Texas, Inc.*, 69 F. Supp. 2d 858, 861 n.2 (E.D. Tex. 1999) (holding that where plaintiff did not assert claim of retaliation in her complaint, issue was not before the court).

Furthermore, Johnson's allegations regarding a hostile work environment based on his race failed to demonstrate that any of the alleged discrimination occurred because of Johnson's race, and the Fifth Circuit concluded that Johnson's "problems with Lt. Griffin would appear to have extended across the board and not to have centered around race." *Id.* Johnson then petitioned for a writ of certiorari, raising a single issue for review.

REASONS FOR DENYING THE WRIT

This Court should deny Johnson's petition for writ of certiorari for several reasons, including that he has waived the sole issue presented for review, failed to challenge the lower appellate court's decision in all necessary respects, and offered a confusing and incomplete presentation to this Court. More specifically: (1) Johnson has waived any claim that he suffered a hostile work environment based on his participation in activity protected under 42 U.S.C. § 2000e-3 because he failed to plead it as part of his First Amended Complaint in the trial court; (2) Johnson has failed to present to this Court a conflict in decisional authority or any other basis for this Court's certiorari jurisdiction; (3) Johnson has failed to challenge the Fifth Circuit's holding that Johnson did not engage in activity protected by Title VII, which is a predicate element to a hostile work environment claim pursuant to section 2000e-3; (4) Johnson challenged neither the Fifth Circuit's holding that his transfer was not an adverse personnel action nor the Fifth Circuit's approach to this element of retaliation claims generally, though he must demonstrate that a "hostile work environment" claim could be considered an "adverse employment action" for purposes of section 2000e-3; and (5) other independent reasons for affirming the lower appellate court's judgment exist, such

as the absence of a sufficiently abusive work environment and a causal connection between his alleged opposition and any harassment.

1. Johnson Has Waived Any Argument Regarding the Viability of a Hostile Work Environment Claim Based on Engaging in Protected Activity Under 42 U.S.C. § 2000e-3 by Failing to Plead It in His Trial Court Complaint

Although Johnson's district court complaint alleged discrimination on the basis of his national origin (construed to mean his race), the substance of his complaint vacillated between asserting discrimination on the basis of Johnson's race (Black) and complaining, in his statement of the facts, about orders regarding the treatment of San Antonio area residents. (R 92-97) In his "substantive allegations," Johnson expressly limited any claims for "harassment" to his race. (R 97-98) Specifically, Johnson pled:

> Plaintiff, Odell Johnson, Jr., who is black, began his employment with the defendant, City of San Antonio in 1986 as a patrol officer. During his employment with Defendant, Plaintiff alleges that he was subjected to harassment by his supervisors because of his race. In support thereof, Plaintiff alleges that although his job performance was similar to other employees in his work area, he was singled out by his superiors by continuously being harassed about his performance. After filing an internal complaint of racial discrimination with the Defendant, Plaintiff was subjected to retaliation in that he was involuntarily transferred. After being requested to explain to Plaintiff the

> reason for his transfer, the Defendant failed to provide any supportive documentation or information justifying Plaintiff's transfer. Plaintiff also alleges that the area in which he worked prior to his transfer was racially charged with derogatory ethnic statements.

(R 97-98) Furthermore, under the heading "Prima Facie Case of Discrimination in Employment," Johnson again focused on his race by pleading:

> To establish a prima facie case of employment discrimination based on race, national origin or ethnicity an employee must demonstrate that: (1) he is within the protected class, that is, Black (African-American). . . . In the case at bar, Plaintiff satisfies each element as follows: (a) The plaintiff is Black (African-American), and therefore, a member of the protected class. . . . (c) It is submitted, upon information and belief, that the Plaintiff was singled out and subjected to harassment by his supervisors, when other employees, who were not black, and who had similar job performances as the Plaintiff were not singled out and harassed. . . . (d) The Plaintiff was involuntarily transferred out of his position upon filing an internal complaint of racial discrimination.

(R 98-99) Though these statements were followed by Johnson's conclusion that his claim of "intentional discrimination" had been established, the City moved for summary judgment on any "hostile work environment" claim out of an abundance of caution based on Johnson's reference

to harassment. (R 99) The only other assertion regarding "harassment" in Johnson's pleadings were made under his state law negligent retention claim, the disposition of which he did not appeal to the Fifth Circuit:

> Plaintiff also contends that Defendant, by and through it's [sic] supervisory members within the San Antonio Police Department constantly or at least on more occasions that [sic] can be listed, harassed and denigrated the Plaintiff with racial and/or national origin slurs.

(R 100) *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) (explaining that Federal Rule of Civil Procedure 8 requires "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); *see also* FED. R. CIV. P. 10(b) (requiring all averments of claim to be made in numbered paragraphs, "the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances," and explaining that discrete claims should be plead in separate counts). Nowhere did Johnson plead that he was subjected to a hostile work environment based on his participation in protected activity under section 2000e-3.[4]

---

4. Johnson did assert, in a vague way, this issue in his summary judgment responsive pleadings. (R 146-79) ("Plaintiff's First Amended Complaint alleges that the City of San Antonio discriminated against him on the basis of his race and due to retaliation for reporting unlawful activities, which is a protected activity, both of which generated a hostile work environment, thus constituting the unlawful employment discrimination which prompted Plaintiff's involuntary transfer to the 'dog watch' in another unit"). However, that effort did not bring the issue before the district court

(Cont'd)

On appeal, Johnson argued to the lower appellate court that he was subjected to a hostile work environment because he was Black. (*Appellant's Brief at 20*) But into this claim he wove the assertion that the hostile work environment resulted from his complaints of discrimination against San Antonio visitors and residents. He did so by pointing to various instances that allegedly created a hostile work environment, such as being placed on special assignment and being characterized as lazy and unproductive, but stated that those instances were pretexts for retaliation based on his reports of alleged illegal orders and activity.

"Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) ("It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered," and rule is equally applicable in summary judgment cases). Furthermore, "[t]his court sits as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.* This Court has steadfastly adhered to this principle. *See, e.g., United States v. Alvarez-Sanchez*,

---

(Cont'd)
for purposes of being able to raise it to the Fifth Circuit. (R 270-77) *See, e.g., Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1255 (5th Cir. 1995) (noting that district court did not address merits of argument not included in complaint and raised for first time in response to motion for summary judgment; Fifth Circuit declined to address it); *Williams v. Army & Air Force Exch. Serv.*, 830 F.2d 27, 29 (3d Cir. 1987) (holding that grant of summary judgment effectively denied motion for leave to amend, though never formally acted upon).

511 U.S. 350, 360 n.5 (1994); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989); *Heckler v. Campbell*, 461 U.S. 458, 469 n.12 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 433-34 (1940); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927).

There is nothing exceptional about this case that would allow Petitioner to ignore trial court pleading requirements and raise a separate claim in the Fifth Circuit without having included it in his complaint. Because Petitioner did not plead the claim in the district court, it should be considered waived. Even if this Court were to overlook this particular waiver, Petitioner has waived review in several other respects, any one of which would prevent favorable review.

2. Petitioner Has Waived Review in This Court By Failing to Assert Any Basis for This Court's Review

A principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the United States courts of appeals concerning the interpretation and construction of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991). In an attempt to assert a conflict among circuit courts of appeals as a basis for this Court's review, Johnson cites three unpublished opinions: *Boykin v. Michigan Dep't of Corr.*, 211 F.3d 1268, 2000 WL 491512 (6th Cir. 2000); *Goodman v. State of Maryland Dep't of Social Servs.*, 64 F.3d 657, 1995 WL 501355 (4th Cir. 1995); *Bishena v. Marriott Corp.*, 959 F.2d 239, 1992 WL 73193 (9th Cir. 1992). Not a single one of these cases upheld any type of hostile work environment claim, much less one based on complaint activity rather than a category enumerated in section 2000e-2(a). This Court's review is confined to cases "where there is a real and embarrassing conflict of opinion

and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Johnson has failed to make that showing.

Similarly, Johnson cites this Court's decision in *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993) as conflicting with the Fifth Circuit's decision below. However, *Harris* involved a hostile work environment claim based on sexual harassment, a category recognized by the Fifth Circuit as one on which protected actvity could rest and, thus, a hostile work environment claim *could* be based. Johnson has demonstrated no conflict.

3. Petitioner Has Waived the Only Issue He Presents to This Court By Failing to Challenge the Fifth Circuit's Holding That He Did Not Engage in Protected Activity Under 42 U.S.C. § 2000e-3

In his appellate brief to the Fifth Circuit, Johnson asserted a hostile work environment claim "on account of protected opposition" and "protected participation." (*Appellant's Brief at 24, 27*) As explained above, this claim was not raised in his trial court complaint. Moreover, the protected opposition and participation asserted by Johnson as a basis for his hostile work environment claim was limited to complaints Johnson made regarding Lt. Griffin's orders, which were directed at persons in the downtown area and not SAPD employees.[5] (*Appellant's Brief at 9-16, 24-28*)

5. The City does not agree with the Fifth Circuit's statement in its opinion that Johnson raised a claim in that court that he was retaliated against in violation of 42 U.S.C. § 2000e-3 because he protested Lt. Griffin's discrimination against him on the basis of race. At most, Johnson asserted that he was discriminated against because of his race, not that he was retaliated against for making complaints

(Cont'd)

The Fifth Circuit held that Johnson could not state a claim pursuant to section 2000e-3 based on those complaints because they were not directed at "unlawful employment practices." *See Evans v. City of Houston*, 246 F.3d 344, 351 (5th Cir. 2001) (explaining that in order to pursue claim under section 2000e-3, claimant must demonstrate that he engaged in an activity protected by Title VII, *i.e.*, that he has opposed any practice made an unlawful employment practice by this subchapter). Because this is an issue that must be decided favorably to Johnson before he can successfully assert *any* claim pursuant to section 2000e-3, he was required to challenge the Fifth Circuit's resolution against him to this Court. *See Fort Stewart Sch. v. Federal Labor Relations Auth.*, 495 U.S. 641, 653 n.3 (1990) ("Because petitioner loses under the standard set out in the second part of the Authority's test, and because neither party challenges that standard, we need not reach the question . . . whether the Authority's interpretation of the phrase 'to determine the . . . budget' in § 7106 is too generous to the Government"); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982) (explaining why Court would not address incomplete challenge to standing).

(Cont'd)

about discrimination against Johnson based on his race. (*Appellant's Brief at 12*) ("Lt. Griffin did not so assign himself to any other similarly situated non-Black officers for such "hands on" instruction). However, Johnson's issues sought review of the trial court's disposition of his retaliation and hostile work environment claims alone, not of any claim for intentional discrimination. (*Appellant's Brief at iii*) In any event, Johnson expressly limited his "protected activity" hostile work environment claim to complaints he made regarding Griffin's orders. (*Appellant's Brief at 25*) ("Everything Griffin did to Odell Johnson . . . was designed to harass [him] on account of [his] opposition to [Griffin's] discriminatory orders").

Nowhere in his issues presented does Johnson challenge that ruling. Instead, he raises the issue of whether a hostile work environment claim can be predicated on section 2000e-3 as a general matter — an issue that the Fifth Circuit did not reach.[6] Not only must an issue generally be raised below to preserve it for review by this Court, but a Petitioner must present the question for this Court's review in its petition for certiorari. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 28 (1993) ("In order to reach the merits of this case, we would have to address a question that was neither presented in the petition for certiorari nor fairly included in the one question that was presented. Because we will consider questions not raised in the petition only in the most exceptional cases, and because we conclude this is not such a case, we dismiss the writ of certiorari as improvidently granted"); *Steagald v. United States*, 451 U.S. 204, 208 (1981) (explaining that party may waive issue for review when it has acquiesced in contrary findings by lower courts).

As this Court recognized in *Izumi*, Supreme Court Rule 14.1(a) cautions that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." 510 U.S. at 30-31. "Faithful application will . . . inform those who seek review here that we continue to strongly 'disapprove the practice of smuggling additional questions into a case after we grant certiorari.' " *Id.* at 34. *See also Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995)

6. To the extent Johnson attempts to raise additional issues in his discussion of the facts, he has waived them by failing to present them in his questions to this Court and by failing to brief them in any way. *Izumi*, 510 U.S. at 28; *Daniels v. Williams*, 474 U.S. 327, 341 n.17 (1986) (holding that state-action objection in one sentence constitutes nothing more than a bare reference, which is inadequate to mount a challenge).

(same). Because Johnson failed to raise the issue to this Court in his petition for writ of certiorari, it is waived. Furthermore, because the Fifth Circuit's decision on this issue precludes success pursuant to any further claim based on section 2000e-3, the Fifth Circuit's decision can only be affirmed.

4. Petitioner Has Waived the Only Issue He Presents to This Court By Failing to Challenge the Fifth Circuit's Treatment of the Adverse Personnel Action Element of Claims Brought Under 42 U.S.C. § 2000e-3

In the part of the opinion in which the Fifth Circuit addressed those claims it assumed cognizable under section 2000e-3, namely Johnson's retaliation claim based on his transfer, the Fifth Circuit held that Johnson failed to establish that he suffered an adverse employment action. Johnson did not challenge or address in any way that holding, presumably in light of this Court's recent denial of a petition for writ of certiorari in *Serna*, where a similar issue was presented. *Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir.), *cert. denied*, 122 S. Ct. 347 (2001).

Nor does Johnson challenge the Fifth Circuit's approach to the "adverse employment action" element as part of any claim based on section 2000e-3. *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir.) (explaining nature of adverse employment action element), *cert. denied*, 522 U.S. 932 (1997). Instead, Johnson's issue is narrowly focused on whether a "hostile work environment" claim can rest on anything other than the categories enumerated in section 2000e-2(a), and does not even address whether a "hostile work environment" claim could ever be considered an "adverse employment action" for purposes of section 2000e-3, which Johnson would have to do in order ultimately to

prevail. *See Evans*, 246 F.3d 344, 352 (5th Cir. 2001) (listing adverse employment action as element of retaliation claim under section 2000e-3). Johnson's petition should be denied.

5. Respondent Raised Other Grounds Below That Provide Independent Support for the Fifth Circuit's Decision and Judgment

In the lower appellate court, the City also argued against Johnson's hostile work environment claim, in its entirety, because the evidence Johnson cited in support of the claim did not cross the requisite abusiveness threshold. Thus, Johnson could not and did not establish that this "harassment" affected a term, condition, or privilege of employment. *See Harris*, 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview").

Furthermore, assuming that a hostile work environment claim can be based on having engaged in protected activity under section 2000e-3, the harassment must be causally related to protected activity, just as the harassment in the context of a claim under section 2000e-2(a) must be causally related to one of the protected categories enumerated therein. *See, e.g., Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000) (explaining that the discriminatory intimidation, ridicule and insults must be racially motivated); *see also Mato v. Baldauf*, 267 F.3d 444, 450 (5th Cir. 2001) (to prevail on retaliation claim, claimant must show that a causal connection existed between the protected activity and the adverse employment action). In the context of Johnson's retaliation

claim based on his transfer, the City explained how Johnson failed to establish a causal link between his transfer or any harassment and his opposition to Griffin's orders.

The absence of a causal link rested on, among other things, the fact that several instances of "opposition" took place *after* Johnson was transferred from Griffin's supervision and the missing element of knowledge of many of the complaints that took place prior to his transfer. For example, though Johnson claimed to have conveyed complaints to Griffin beginning in 1994 and at the departmental meeting in mid-1995, Johnson never testified that Griffin harassed him about or made reference to any of these complaints. Also, while Johnson asserted that he told Griffin, prior to July 19, 1995, that he had been to see Officer Taylor, it was admittedly after and in response to the "harassment" that Johnson alleges to have suffered at Griffin's hand. (X "A" to Doc. No. 17 at 62-63) Nor does Johnson's disciplinary record support an inference of causation. Johnson testified that he was never disciplined for not following the orders given by Lt. Griffin that he says he opposed, yet expects this Court and ultimately a jury to believe that he was harassed for complaining about them. (X "A" to Doc. No. 17 at 61) There is no causal connection between any retaliation or discrimination and Johnson's complaints.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JACQUELINE M. STROH
Counsel of Record
CROFTS & CALLAWAY
A PROFESSIONAL CORPORATION
112 East Pecan Street
Suite 800
San Antonio, TX 78205-1517
(210) 299-0289

DEBORAH LYNNE KLEIN
OFFICE OF THE CITY ATTORNEY
Assistant City Attorney IV
P.O. Box 839966
San Antonio, TX 78283-3966
(210) 207-8950

MARK KOSANOVICH
FITZPATRICK & KOSANOVICH, P.C.
P.O. Box 831121
San Antonio, TX 78283
(210) 207-7259

Attorneys for Respondent